# SUPREME COURT OF THE UNITED STATES.

## No. 126.

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THE UNITED STATES, PLAINTIFF,

vs.

LOUIS BENECKE.

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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

In the circuit court of the United States for the western district of Missouri.

THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX.

Indictment, retaining pay and bounty from claimants as attorneys and agents.

Be it remembered that heretofore, to wit, on the 14th day of April, A. D. 1876, in vacation of said circuit court, the following proceedings were had in said cause, to wit:

THE UNITED STATES
vs.
LOUIS BENECKE. } No. 720.

This day there is received from the clerk of the United States district court for the western district of Missouri, and filed herein, a transcript of the record in the above cause together with the following papers, viz: Indictment, order to enter into recognizance, bail bond, demurrer to indictment, demurrer to evidence of defendant Cox, motion to set aside the verdict, motion in arrest of judgment, verdict, and other papers.

The transcript above referred to is in words and figures following, to wit:

2 UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

In the district court of the United States for the western district of Missouri.

THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX. } No. 1222.

Indictment, retaining pay & bounty from claimants as att'ys & agents.

Be it remembered that at a regular stated term of the district court of the United States for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the first Monday, the sixth day of September, A. D. 1875, the following proceedings were had in the above-entitled cause, on Saturday, September 11th, 1875, to wit:

The grand jurors come into court and make the following presentment, to wit:

THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX. } No. 1222. A true bill.

Which said bill of indictment is herewith remitted to the U. S. circuit court.

And afterward the following further proceedings were had in said case, to wit:

THE UNITED STATES
*vs.*
LOUIS BENECKE AND JOHN COX. } No. 1222. Indictment.

On motion of the district attorney it is ordered by the court
3 that a capias issue for Louis Benecke to the marshal for the western district of Missouri, and for John Cox to the marshal for the eastern district of Missouri, both returnable forthwith.

And afterward, to wit, on Thursday, the 16th day of September, 1875, the following further proceedings were had in said case, to wit:

THE UNITED STATES
*vs.*
L. BENECKE & JOHN COX. } No. 1222. Indictment.

On this day comes the district attorney on behalf of the United States, and on his motion it is ordered by the court that a capias issue for Louis Benecke to the eastern district of Missouri, returnable forthwith.

And now comes Sarah Stroter, Polk Lard, Sophronia Farmer, Caroline Redden, Ann Parker, Emma Warden, and G. D. Kennedy, & severally acknowledged themselves indebted to the United States each in the sum of *of* five hundred dollars to be levied of their goods and chattels, lands & tenements, and to the United States rendered, conditioned for their personal appearance before this court from day to day and term to term to testify on the part of the United States and not depart the said court without leave thereof.

And afterward, to wit, on Monday, September 20th, 1875, the
4 following further proceedings were had in said case, to wit:

UNITED STATES
*vs.*
L. BENECKE & JNO. COX. } No. 1222. Indictment.

Now, at this day, comes the district attorney on behalf of the United States, and also comes the defendant John Cox, in his own proper person and by his attorneys, Lay & Belch.

And it being forthwith demanded of the said defendant of and concerning the premises, and how he will acquit himself, for plea says he is not guilty as charged in the indictment preferred against him jointly with Louis Benecke, and for his trial puts himself upon the country, and the United States does the like.

And it is now ordered by the court that the said defendant, John Cox, enter into recognizance in the sum of two thousand dollars for himself, and in a like sum on the part of good and sufficient sureties, conditioned for his personal appearance before this court from day to day during the pending of such indictment, and that he be remanded into the custody of the marshal until he shall have entered into such recognizance.

And afterwards, to wit, on Saturday, the 25th day of Septembe 1875, the following further proceedings were had in said case, to wit:

THE UNITED STATES
vs.
5 LOUIS BENECKE & JNO. COX. } No. 1222. Indictment.

On this day comes John Cox, one of the defendants, and also comes George M. Irwin, surety, and severally acknowledge themselves indebted to the United States each in the sum of two thousand dollars to be levied of their goods and chattels and to the United States rendered, conditioned for the personal appearance before this court of him, John Cox, from day to day & term to term, as he may be ordered to do, during the pending of the indictment preferred by the grand jury against Louis Benecke jointly with him the said Cox.

And afterwards, to wit, on Friday, the 1st day of October, A. D. 1875, the following further proceedings were had, to wit:

THE UNITED STATES
vs.
JOHN COX & L. BENECKE. } No. 1222. Indictment.

On this day comes the district attorney, on behalf of the United States, and also comes the defendant, John Cox, in his own proper person, when the defendant is ordered to appear in person before this court on the first day of the March term, 1876, and from day to day.

And afterwards, to wit, on Tuesday, 12th day of October, 1875, the following further proceedings were had, to wit:

THE UNITED STATES
vs.
6 L. BENECKE & JNO. COX. } No. 1222. Indictment.

It is now ordered by the court that a capias, accompanied by a certified copy of the indictment herein, returnable forthwith, issue for Louis Benecke, one of the defendants herein, directed to the western district of Wisconsin.

And afterwards, to wit, on Thursday, the 14th day of October, 1875, the following further proceedings were had in said case, to wit:

THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX. } No. 1222. Indictment.

On this day comes the district attorney on behalf of the United States, when, on his motion, it is ordered by the court that the continuance heretofore recorded herein be, and the same is, set aside; and now it is further ordered that pleuris capias, returnable at the next March term, issue to the western district of Wisconsin, and also to the western district of Missouri, issue for Louis Benecke, one of the defendants herein, and now this cause is continued to the March term, 1876.

And afterwards, to wit, in vacation, on Friday, October 29th, 1875, the following further proceedings were had in said case, to wit:

THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX. } No. 1222. Indictment.

7 It is now ordered by the court that Louis Benecke forthwith

enter into recognizance before any commissioner of the circuit court of the United States for the western district of Missouri, in the sum of two thousand dollars for himself, and in a like sum on the part of good and sufficient sureties, conditioned for the personal appearance of the said Benecke before this court on the first Monday in March, 1876, to answer the indictment preferred against him jointly with John Cox, and from day to day and term to term of said court, as he may be ordered, and to submit to and obey all orders made by the court during the pending of such indictment.

And it is further ordered that the commissioner taking such recognizance examine the several sureties offered on their oath, touching their sufficiency; that he reduce to writing the testimony, showing the nature and kind & value of property owned, as well as liabilities; cause the same to be subscribed by such sureties, and transmit the same, together with the recognizance, to this court forthwith.

And afterward, to wit, on Saturday, November 13th, 1875, at an adjourned day of said September term, 1875, the following proceedings were had in said case, to wit:

8 THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX. } No. 1222. Indictment.

On this day the recognizance of Louis Benecke, one of the defendants, is filed, such recognizance being in the sum of two thousand dollars, conditioned for his appearance before this court on the first Monday of March, 1876, whereupon such recognizance is by the court approved.

And be it remembered that at a regular stated term of the district court of the United States for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the first Monday, the 6th day of March, 1876, the following further proceedings were had on Monday, March 6th, 1876, to wit:

*Demurrer to indictment.*

THE UNITED STATES
vs.
LOUIS BENECKE & JOHN COX. } No. 1222.

Ind't, retaining pay & bounty from claimants, as att'ys & agents.

On this day comes the district attorney on behalf of the United States, and also come the defendants Louis Benecke and John Cox, in their own proper person and by their attorneys, Lay & Belch and C. A. Winslow, and thereupon, with leave of court, the plea of not guilty heretofore entered herein by John Cox is withdrawn, when a demurrer to the indictment is filed.

9 And afterwards, to wit, Tuesday, 7th day of March, 1876, the following further proceedings were had in said case, to wit:

THE UNITED STATES
vs.
LOUIS BENECKE AND JOHN COX. } No. 1122.

Indictment for retaining pay & bounty from claimants as attorneys & agents.

On this day comes the district attorney, on behalf of the United States,

and also come the defendants Louis Benecke and John Cox, in their own proper person and by A. M. Lay, of counsel, when the demurrer heretofore filed is argued and submitted.

*Demurrer overruled.*

THE UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX. } No. 1222.

Ind't for retaining pay and bounty from claimants as att'ys and ag'ts.

On this day comes the district attorney on behalf of the United States, & also come the defendants Louis Benecke and John Cox, in their own proper person and by their attorney, A. M. Lay, and the court being fully advised, is of opinion that the law upon the demurrer heretofore filed and submitted is for the United States, and in accordance with such opinion it is ordered and adjudged that such demurrer be and the same is overruled.

And thereupon the plea of not guilty of the defendant John
10 Cox is renewed; and it being now forthwith demanded of the defendant Louis Benecke of and concerning the premises and how he will acquit himself, for plea says he is not guilty as charged in the indictment preferred against him jointly with John Cox, and for trial puts himself upon the country, and the United States do the like.

And afterward, to wit, on Friday, 10th day of March, A. D. 1876, the following further proceedings were had in said case, to wit:

THE UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX. } No. 1222.

Ind't for retaining pay & bounty from claimants as att'ys & ag'ts.

On this day comes the district attorney, on behalf of the United States, and also comes John Cox, one of the defendants, by A. M. Lay, of counsel, when, on motion of the district attorney, it is ordered by the court that an attachment issue, returnable forthwith, for F. A. Seely; and thereupon said defendant John Cox files an application under oath asking that witness be subpœn'ed on his behalf at the expense of the United States.

And afterwards, to wit, on Saturday, the following further proceedings were had in said case:

THE UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX. } No. 1222.

Ind't for retaining pay and bounty from claimants as att'ys & agents.

11 On this day comes the district attorney, on behalf of the United States, and also comes John Cox, one of the defendants, by A. M. Lay, of counsel, and on the application of the said defendant heretofore filed it is now ordered by the court that a subpœna issue at the

expense of the United States for Geo. Folkelman, William E. Perkinson, E. Selig, and Chas. Bennett, on behalf of said defendant John Cox, returnable forthwith.

And afterwards, to wit, on Saturday, March 25th, 1876, the following further proceedings were had in said case, to wit:

UNITED STATES
*vs.*
LOUIS BENECKE AND JOHN COX. } No. 1222.

Indictment for retaining pay & bounty from claimants as att'ys and agents.

Now at this day comes the district attorney on behalf of the United States, and also come the defendants Louis, Benecke & John Cox, in their own proper person and by Lay and Winslow, their attorneys, and it being forthwith demanded of the said defendants of and concerning the premises, and how they will acquit themselves, for plea, say they are not guilty as charged in the indictment preferred against them, and for their trial put themselves upon the country, and the United States do the like.

12 And thereupon come a jury, to wit, Adam K. Reyburn, Stephen Hernden, H. S. Hall, John Hammonds, B. F. Olden, Jas. E. Gaylord, Tho's Higginbotham, W. H. Hillis, John E. Holcomb, Reuben Slater, B. E. Hummel, and M. C. Draper, twelve good and lawfull men, duly elected, tried, and swoorn well and truly to try and true deliverance make between the United States and the defendants Louis Benecke and John Cox, when evidence is heard in part, and for want of time the further hearing of this cause is continued until next Monday morning.

And afterwards, to wit, on Monday, March 27th, 1876, the following further proceedings were had, to wit:

THE UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX. } No. 1222.

Indictment for retaining pay and bounty from claimants as att'ys and agents.

Now on this day again comes the district attorney on behalf of the United States, and also come the defendants, Louis Benecke and John Cox, in their own proper person, and by Lay and Winslow, their attorneys, as well as the jury, to wit, Adam K. Reyburn, Stephen Hernden, H. S. Hall, John Hammonds, B. F. Olden, James E. Gaylord, Thomas Higginbotham, W. H. Hillis, John E. Holcomb, Reuben Slater, B. E. Hummel, & M. C. Draper, when further evidence is heard; and the hour of adjournment having arrived, this cause is continued till
13 to-morrow morning.

And on Tuesday, March 28th, 1876, the following further proceedings were had in said cause, to wit:

THE UNITED STATES
*vs.*
L. BENECKE & JNO. COX. } No. 1222.

Ind't retaining pay and bounty from claimants as att'ys & agents.

On this day comes the district attorney on behalf of the United States,

and also comes the defendants, Louis Benecke and John Cox, in their own proper persons and by their attorneys, Lay & Winslow, as well as the jury, to wit: Adam K. Reyburn, Stephen Hernden, H. S. Hall, John Hammonds, B. F. Olden, James E. Gaylord, Thomas Higginbotham, W. H. Hillis, John E. Holcomb, Reuben Slater, B. E. Hummel, and M. C. Draper, when a demurrer to the evidence is filed, so far as the same relates to John Cox, and the same being argued and submitted, it is thereupon ordered by the court that such demurrer be sustained, and that said defendant, John Cox, be discharged and go hence without day.

Demurrer to evidence as to John Cox.

Demurrer sustained.

And it is further ordered that the recognizance of said defendant John Cox and his sureties be, and the same is hereby, discharged.

And thereupon further evidence is heard, and for want of time the further hearing of this cause is continued until to-morrow morning.

14 And on Wednesday, March 29th, 1876, the following further proceedings were had in said case, to wit:

UNITED STATES
vs.
LOUIS BENECKE. } No. 1222.

Ind't for retaining pay & bounty from claimants as att'ys & agents.

On this day again comes the district attorney on behalf of the United States, also comes the defendant Louis Benecke, in his own proper person and by Lay & Winslow, his attorneys, as well as the jury, to wit: Adam K. Reyburn, Stephen Hernden, H. S. Hall, John Hammonds, B. F. Olden, James E. Gaylord, Thomas Higginbotham, W. H. Hillis, John E. Holcomb, Reuben Slater, B. E. Hummel, & M. C. Draper, when cause is argued in part by counsel, and for want of time to conclude the same further argument is continued until to-morrow morning.

And afterwards, on Thursday, March 30th, 1876, the following further proceedings were had in said case, to wit:

THE UNITED STATES
vs.
LOUIS BENECKE. } No. 1222.

Ind't for retaining pay and bounty from claimants as att'ys & ag't.

On this day again comes the district attorney on behalf of the United States, and also comes the defendant Louis Benecke, in his own proper person and by his attorneys, Lay and Winslow, as well as the jury, to wit: Adam K. Reyburn, Stephen Hernden, H. S. Hall, John
15 Hammonds, B. F. Olden, James E. Gaylord, Thomas Higginbotham, W. H. Hillis, John E. Holcomb, Reuben Slater, B. E. Hummel, and M. C. Draper, when the cause is further argued by counsel, and the jury being charged, return into court the following verdict:

*Verdict.*

We, the jury, find the defendant not guilty on the first, second, third, fourth, fifth, seventh, eighth, and nineth counts of the indictment, and guilty in the manner and form as charged in the sixth and tenth counts of the indictment.

JOHN E. HOLCOMB,
*Foreman.*

And afterwards, to wit, on Monday, April 3d, 1876, the following further proceedings were had in said case, to wit:

*Motion for new trial.*

UNITED STATES
*vs.*
LOUIS BENECKE. } No. 1222.

Indictment, retaining pay and bounty from claimants as att'ys & agent.

On this day comes the defendant Louis Benecke, by Waters & Winslow, of counsel, when a motion for a new trial and a motion in arrest of judgment are filed.

And afterwards, to wit, on Thursday, April 6th, 1876, the following further proceedings were had in said case, to wit:

THE UNITED STATES
*vs.*
LOUIS BENECKE. } No. 1222.

Indictment, retaining pay and bounty from claimants, as att'y & ag't.

It being the opinion of the court that the question of law as to
16 the application of the statute of limitations in this case, as to the repeal of the 12th and 13th section of the acts of July 4, 1864, by the 8th section of the act of July 8th, 1870, are important and difficult, and are involved in the case, it is now ordered that, pursuant to section 1038 of the revised statutes and for the purpose of determining said question, the indictment and all the papers in the case be remitted to the circuit court of the United States for this district, and that said defendant be and appear before said last-named court, on the first day of the April term, 1876, thereof.

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

I, Louis Schmidt, clerk of the district court of the United States for the western district of Missouri, do hereby certify that the above and foregoing is a true and complete transcript of the record in the case where the United States is plaintiff and Louis Benecke & John Cox defendant, in suit upon indictment preferred against them by the
17 grand jurors of the United States for said district, for retaining pay and bounty from claimants, as attorneys & agents, as fully as the same remain of record in said case in this office.

In witness whereof I hereunto subscribe my name & affix the seal of said court, at office, in the city of Jefferson, in said district, this 13th day of April, A. D. 1876.

[SEAL OF THE UNITED STATES DISTRICT COURT, WEST. DIST. OF MO.]

LOUIS SCHMIDT,
*Clerk.*
By CHARLES E. HESS,
*D. C.*

18 The indictment referred to and filed April 14th, 1876, in the clerk's office, with the other papers in this cause, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

In the United States district court for the western district of Missouri, at the September term, 1875.

The grand jurors of the United States of America, duly empannelled, sworn, and charged to inquire within and for the said western district of Missouri, on their oath present, that Louis Benecke and John Cox, late of said district, on the twentieth day of February, in the year of our Lord eighteen hundred and sixty-nine, and con from said last-
mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Ann Parks, who was then and there a claimant of the United States for arrears of pay and bounty for services in the war of the rebellion of her deceased son, Thomas
19 Parks, the sum of one hundred and twenty-eight dollars, which was then and there and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Ann Parks for the prosecution of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

2. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and continuously from said last-mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Ann Parks, who was then and there a claimant of the United States for pay and bounty of her deceased son, John Parks, the sum of four hundred and thirty and $\frac{80}{100}$ dollars, which was then and there and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox being then and there the agents and attorneys of the said Ann Parks for the collection of said claim, and having received said money as such agents and attorneys, contrary to the
20 form of the statute in such case made and provided, and against the peace and dignity of the said United States.

3. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and continuously from said last-mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Ann Parks, who was then and there a claimant of the United States for pay and bounty of her deceased son, Robert Parks, the sum of one hundred and sixty-three $\frac{12}{100}$ dollars, which was, then and there, and still is due from and allowed by the United states, they the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Ann Parks, for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

4. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the first day of April, in the year of our Lord one thousand eight
21 hundred and sixty-eight, and continuously from said last-mentioned day, until the present time, at the district aforesaid, did wrongfully withhold from one Sophronia Farmer, who was, then and there, a

claimant of the United States for pay and bounty of her deceased husband, Wilson Farmer, the sum of three hundred and sixty-nine dollars, which was, then and there, and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being, then and there, the agents of the said Sophronia Farmer, for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

5. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the fifth day of May, in the year of our Lord one thousand eight hundred and seventy, and continuously from said last mentioned day, until the present time, at the district aforesaid, did wrongfully withhold from one Emma Warden who was, then and there, a claimant of the United States for pay and bounty of her deceased husband, Asbury Warden, the sum of fifty-nine dollars, which was, then and there, and still
22 is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being, then and there, the agent and attorneys of the said Emma Warden, for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

6. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and continuously from said last-mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Polk Lord, who was then and there a claimant of the United States for arrears of pay and bounty, the sum of two hundred and ten dollars, which was then and there and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Polk Lord for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

23 7. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy, and continuously from said last-mentioned day, until the present time, at the district aforesaid, did wrongfully withhold from one David Price, who was then and there a claimant of the United States for pay of his deceased son, Dallas Price, the sum of eighty-one dollars, which was then and there and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said David Price for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

8. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy, and continuously from said last-mentioned day, until the present time, at the district aforesaid, did wrongfully
24 withhold from one David Price and Letty Price, who was then

and there a claimant of the United States for bounty of their deceased son, Dallas Price, the sum of eighty-seven dollars, which was then and there and is still due from and allowed by the United States, they, the said Louis Benecke and John Cox, being, then and there, the agents and attorneys of the said David Price and Letty Price for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

9. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the fifth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and continuously from said last-mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Jackson Rowlett, who was then and there a claimant of the United States for pay and bounty, the sum of forty-seven dollars, which was then and there and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Jackson Rowlett for the collec-
25 tion of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

10. And the grand jurors aforesaid, on their oath aforesaid, do further present, that Louis Benecke and John Cox, late of said district, on the seventeenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and continuously from said last-mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Silke Eikhoof, who was then and there a claimant of the United States for pay and bounty of her deceased brother, Karsten Thede, the sum of four hundred and sixty-nine dollars, which was then and there and is still due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Silke Eikhoof for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

JAMES S. BOTSFORD,
*United States Attorney.*

UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX. } 1222.

A true bill.

J. A. GRIFFITH,
*Foreman of the Grand Jury.*

Filed Sept. 11, 1875.

ALFRED S. KREKEL, *Clerk.*

Filed April 14, 1876.

H. C. GEISBERG, *Clerk.*

26 The order to enter into recognizance is in words and figure following, to wit:

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

In the district court of the United States for the western district of Missouri.

UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX. } No. 1222.

Ind't for retaining pay & bounty from claimants, as their agents and attorneys.

It is now ordered by the court that Louis Benecke forthwith enter into recognizance before any commissioner of the circuit court of the United States for the western district of Missouri, in the sum of two thousand dollars for himself, and in a like sum on the part of good and sufficient sureties, conditioned for the personal appearance of the said Benecke before this court on the first Monday in March, 1876, to answer the indictment preferred against him jointly with John Cox, and from day to day and term to term of said court, as he may be
27 ordered, and submit to and obey all orders made by the court during the pending of such indictment.

And it is further ordered, that the commissioner taking such recognizance examine the several sureties offered on their oaths touching their sufficiency, that he reduce to writing the testimony, showing the nature and kind and value of property owned, as well as liabilities, cause the same to be subscribed by such sureties, and transmit the same, together with the recognizance, to this court forthwith.

Witness the honorable Arnold Krekel, judge of the United States for the western district of Missouri, this 29th day of October, 1875.

Issued at office, under seal of said court, the day and year last above written.

{ SEAL OF THE U. S. DISTRICT COURT, WEST. DIST. OF MO. } ALFRED S. KREKEL, *Clerk*,
By CHARLES E. HESS, *D. C.*

The recognizance or bail-bond referred to is in words and figures following, to wit:

28 We, Louis Benecke, as principal, and Josaphine Benecke, Otto Amerlan, Cha's A. Winslow, Albert Griffen, Seneca D. Townsend, and Edward Sterne, as sureties, acknowledge ourselves to owe and be indebted to the United States of America in the sum of four thousand dollars, that is to say, the said Louis Benecke in the sum of two thousand dollars, and the said Josaphine Benecke, Otto Amerlan, Cha's A. Winslow, jointly in the like sum of two thousand dollars, to be levied of our lands and tenements, goods, and chattels; yet to be void, if the above bounden Louis Benecke shall make his personal appearance before the United States district court for the western district of Missouri, at the next term thereof, to be begun and holden at the city of Jefferson in said district, on the first Monday in March, 1876, and from day to day, and term to term, of said court, as he may be ordered, and submit to and obey all orders of said court during the pendency of said indictment, then and there to answer an indictment found against him jointly with one John Cox, in Case No. 1222, being the United States vs. Louis

Benecke & John Cox, for retaining pay and bounty from claimants as their agents, &c.

In testimony whereof we have hereunto set our hands and
29 seals this the 1st day of November, 1875.

| | |
|---|---|
| LOUIS BENECKE. | [SEAL.] |
| JOSEPHINE BENECKE. | [SEAL.] |
| OTTO AMERLAN. | [SEAL.] |
| CHA'S A. WINSLOW. | [SEAL.] |
| ALBERT GRIFFEN. | [SEAL.] |
| SENECA D. TOWNSEND. | [SEAL.] |
| EDWARD STERNE. | [SEAL.] |

UNITED STATES OF AMERICA,
*Western District of Missouri:*

Personally appeared before me, H. M. Pollard, a commissioner of the circuit court of the United States for said district at the town of Brunswick, in said district, on the 3d day of Nov., 1875, the above bounden Louis Benecke, Josephine Benecke, Otto Amerlan, Charles A. Winslow, Albert Griffen, Seneca D. Townsend, and Edward Sterne, who being by me examined, acknowledged that they executed and delivered the above instruments voluntarily & for the purposes therein mentioned.

Witness my hand this Nov. 10, 1875.

H. M. POLLARD,
*U. S. Com'r.*

Josephine Benecke, being sworn, says she is one of the sureties on the bail bond of Louis Benecke hereto attached, and that she is the
30 owner in fee of a house & lot in Brunswick, M'o, worth twenty-five hundred dollars; that said property is unincumbered, and that she has no liabilities.

JOSEPHINE BENECKE.

Subscribed and sworn to before me this Nov. 3d, 1875.

H. M. POLLARD,
*U. S. Com'r.*

Edward Sterne, being sworn, says he is one of the sureties on the bail bond of Louis Benecke hereto attached, and that he owns one house & lot in Brunswick, M'o, worth twenty-five hundred dollars; that it is unincumbered; that he has a stock of merchandise worth one thousand dollars unincumbered; that his liabilities are five hundred dollars and not more.

EDWARD STERNE.

Subscribed and sworn to before me this Nov. 3d, 1875.

H. M. POLLARD,
*U. S. Com'r.*

Otto Amerlan, being sworn, says he is one of the sureties on the ba bond of Louis Benecke hereto attached, and that he owns one house & three lots in Brunswick, M'o, that are unincumbered and are worth one thousand dollars; that he has a stock of merchandise worth five
31 hundred dollars; that his liabilities are not more than four hundred dollars.

OTTO AMERLAN.

Subscribed & sworn to before me this Nov. 3d, 1875.

H. M. POLLARD,
*U. S. Com'r.*

Seneca D. Townsend, being sworn, says he is one of the sureties on the bail bond of Louis Benecke hereto attached, that he owns in fee an undivided third of six hundred & forty acres of land in Chariton County, M'o, his third being worth three thousand dollars, the whole of said 640 acres incumbered for (1,000) one thousand dollars & no more. That he owns an undivided third of two houses and lots in Brunswick, his third being worth three hundred dollars unincumbered save as below. That he has cash one thousand dollars. That he has farm stock worth five hundred dollars. That he owes individually no more than four hundred dollars beside the ⅓ of the $1,000 aforesaid of incumbrance on said 640 acres. The said thousand dollars of incumbrance covers the said property in Brunswick as well as part of said land.

S. D. TOWNSEND.

Albert Griffin, being sworn, says he is one of the sureties for
32 Louis Benecke on his bail bond hereto attached, that he own' in fee a storehouse & lot in Brunswick, M'o, unincumbered, worth two thousand dollars; that he owns in fee about two hundred acres of land in Chariton County, M'o, unincumbered & worth one thousand dollars; that he owns in Brunswick, M'o, a stock of merchandise worth two thousand dollars, farm stock worth four hundred dollars; that he has notes and accounts worth one thousand dollars; that his liabilities are no more than twelve hundred & fifty dollars, $1,250.

A. GRIFFIN.

Subscribed and sworn to before me this Nov. 3d, 1875.

H. M. POLLARD,
*U. S. Com'r.*

Chas. A. Winslow being sworn says, he is one of the sureties for Louis Benecke on his bail-bond hereto attached; that he owns in fee eighty acres of land in Chariton Co., Mo., worth five hundred dollars, and twenty acres in said county worth two hundred dollars; that he owns in Brunswick, Mo., two blocks of ground worth five hundred dollars; that he has an undivided half interest in seventy town lots
33 in Brunswick, Mo., his interest being worth one thousand dollars; that the whole incumbrance on all of said property is no more than two hundred & fifty dollars; that his homestead is not included in above lands; that he has in notes and accounts, and chattels, at least two thousand dollars over and above all liabilities and exemptions.

CHAS. A. WINSLOW.

Subscribed & sworn to before me this Nov. 3d, 1875.

H. M. POLLARD,
*U. S. Com'r.*

(Endorsed on said recognizance, is:) No. 1222. United States vs. Louis Benecke & Jno. Cox. Recognizance of defendant Benecke. App'd Nov. 12, '75. Krekel, judge. Filed Nov. 13, 1875. Louis Schmidt, clerk. Filed Apr. 14, 1876. H. C. Geisberg, clerk.

34 The demurrer to the indictment is in words and figures following, to wit:

U. S. district court for western district of Missouri.

THE UNITED STATES OF AMERICA } No. 1222.
*v.*
LOUIS BENECKE & JOHN COX.

And now come the said defendants by their attorneys, and demur to

the indictment in the above cause, and to the several counts therein, and for grounds of objection thereto allege as follows, to wit:

First. That the facts alleged in said indictment and in the several counts thereof are not sufficient to show that defendants, or either of them, have been guilty of any crime punishable under the laws of the United States.

Second. That it is not averred in said indictment nor in either of the counts thereof, that the claimants therein named and from whom money is alleged to have been wrongfully withheld, had any valid or lawful claim against the United States, nor is it alleged for what services the alleged pay and bounty was due, nor that the same was due for any service, in the Army or otherwise, authorized by law.

35 Third. That there was not at the time of the finding of the indictment in this cause, and is not now, any law of the United States which makes the withholding of money collected as charged in the several counts of said indictment a criminal offense & punishing the same as such, when committed at the several dates in said several counts mentioned, and at which said alleged offenses are charged to have been committed.

Fourth. That the several dates at which it is charged in the said several counts in said indictment that the alleged offenses therein set out were committed are as follows, viz: February 20th, 1869; March 16th, 1869; April 1st, 1868; May 5th, 1870; March 16th, 1868; April 22d, 1870; April 5th, 1869, and March 17th, 1868; and the defendants say that there was not at the time of the finding of the indictment in the above cause, and is not now, any law of the United States, authorizing an indictment for or trial or punishment of offenses such as are charged in the several counts in said indictment, when committed at the said several dates in said several counts set out and charged.

36 Fifth. That there was not at the time of the commission of said alleged offenses in said several counts charged, nor at the time of the finding of the indictment in the above cause, nor at the present time, any law of the United States which makes the withholding of pay or bounty collected as charged in the several counts of this indictment a criminal offense, or authorizes the punishment of the same.

Sixth. That, although so alleged to be in said indictment, the said offenses charged in said several counts of said indictment were not and are not continuing offenses; and it appears upon the face of the said several counts in said indictment that the offenses therein set out and charged were each and all of them committed more than five years before the finding of the indictment in this cause, to wit, more than five years before the September term, 1875, at which said indictment was found; and that by reason thereof said offenses so alleged and charged in said several counts of said indictment are each and all of them barred by the statute of limitations in such case made and provided.

Seventh. That said indictment and the said several counts thereof are otherwise defective, uncertain, & contradictory.

37 Wherefore the defendants say that the said indictment and the said several counts thereof are wholly defective and insufficient in law, and pray judgment if they shall be held and required to further answer the same.

LAY & BELCH AND
WATERS & WINSLOW,
*Att'ys for Defendants.*

The demurrer to the evidence as to John Cox is in words and figures following, to wit:

In the district court of the United States for the western district of Missouri.

THE UNITED STATES
*vs.*
LOUIS BENECKE & JOHN COX.

And now comes the defendant John Cox, by his attorneys, and demurs to the evidence in the above cause, and says that there is no evidence charging or tending to prove him guilty upon either count in the indictment in the above cause.

Wherefore he prays the court to so charge the jury, and to direct that they render a verdict of "not guilty" as to him as to each and all the counts in said indictment.

WINSLOW & LAY,
*Att'ys for Def't.*

38 The motion to set aside the verdict is in words and figures following, to wit:

In the district court of the United States for the western district of Missouri.

THE UNITED STATES OF AMERICA
*against*
LOUIS BENECKE.

And now comes the defendant, by his attorneys, and moves the court to set aside the verdict by the jury rendered on the 6th and 10th counts of the indictment in the above cause, and grant him a new trial, for reasons and causes as follows, to wit:

1. Because the verdict is against the evidence and is not supported by the evidence.
2. Because the verdict is against the law.
3. Because the court permitted the introduction of illegal and incompetent evidence on the part of the government.
4. Because the court refused to allow proper and competent evidence on the part of defendant.
5. Because the court erred in charging the jury as to matters of law.
6. Because there is no evidence whatever to authorize or sustain the verdict of the jury as to either the said 6th or 10th count of said indictment.

39 6½. Because the evidence clearly shows that the offenses charged in said counts, if committed at all, were committed in the years 1868, and that the same are barred by the statute of limitation of the United States in such cases provided.

7. Because the evidence clearly shows that the claimants named in said 6th & 10th counts knew all the facts as to the alleged withholding of the money alleged to have been collected in the year 1868, and the statute of limitation would commence to run from the time said claimants acquired said knowledge.
8. Because upon the evidence the money alleged to have been withheld from said Silke Eikhoof was not due or payable to her.

9. Because since the trial of this cause the defendant has discovered new evidence, material to the issue, not cumulative, which by the exercise of due diligence he was unable to obtain before the trial, and which he will be able to produce on a new trial, if the same be granted him, and which will also tend to change the verdict against him, all which will fully appear by the affidavits of the defendant and the witnesses hereto attached and filed herewith and made a part hereof.

40 10. Because by reason of the number of counts joined in the indictment and the fact that one John Cox was improperly indicted with him he was injured and prejudiced in the minds of the jury, and was unable to make as complete defence to said 6th and 10th counts as he could otherwise have *have* done and can do on a trial alone on said counts.

Because the jury improperly compared two specimens of the handwriting of one Bosse without the privilege of examining other specimens of said handwriting in evidence before them, which said handwriting had special reference to the said 10th count, and which action of the jury had a tendency to prejudice, and did prejudice, the minds of said jury against the defendant in said count.

LAY & BELCH &
WATERS & WINSLOW,
*Def't's Atty's.*

The motion in arrest of judgment filed in said cause is in words and figures following, to wit:

In the district court of the United States for the western district of Missouri.

THE UNITED STATES OF AMERICA
*against*
LOUIS BENECKE.

41 And now comes the defendant in the above cause and moves the court to arrest the judgment in the above cause for reasons and causes as follows, to wit:

First. Because upon the whole record in the above cause the judgment should be for the defendant. Because the facts alleged in the 6th and 10th counts of the indictment in this cause, upon which a verdict of guilty was rendered by the jury, are not sufficient to show that the defendant has been guilty of any crime punishable under or by the laws of the United States.

Second. Because it is not averred or shown in either of said counts in said indictment that the claimants therein named had any valid or lawful claim against the United States, nor is it alleged for what services the alleged pay and bounty were due, nor on what, in what company or regiment, nor for what length of time the same was rendered, nor is it alleged or shown that the said pay or bounty was due for any service authorized by law, in the Army or otherwise.

Third. Because there was not at the time of the finding of the indictment in this cause, and is not now, any law of the United States which makes the withholding of money collected, as charged in said 6th & 10th counts of said indictment, a criminal offense or punishes the

42 same as such.

Fourth. Because it appears from the allegations in the said 6th & 10th counts of said indictment and from the evidence introduced on the

trial of said cause that the offenses charged in said counts are, and were at the time of finding the indictment in this cause, barred by the statute of limitations in such case provided.

LAY & BELCH AND
WALTER & WINSLOW,
*Att's for Def't.*

And be it remembered that at a regular stated term of the circuit court of the United States for the western district of Missouri, begun and held at the city of Jefferson in said district on the 3d Monday, the 17th day of April, 1876, the following proceedings were had, on Tuesday, April 25th, 1876, to wit:

UNITED STATES
*vs.* } No. 720.
LOUIS BENECKE.

This day comes the district attorney on behalf of the United States and A. M. Lay, esq'r, for the defendant, and thereupon this
43 cause is submitted to the court upon the motion in arrest of judgment as certified from the district court; and the judges being divided in opinion respecting the questions of law arising upon said motion in arrest, it is ordered upon the request of parties that the same be certified to the Supreme Court for decision at its next session.

A certificate embodying the points of law upon which the judges are divided in opinion is signed by said judges and now ordered filed and made part of the record. It is further ordered that the clerk make out and transmit to the Supreme Court a copy of the indictment and all record entries in this court.

The certificate of division in opinion signed by the judges, is in words and figures following, to wit:

UNITED STATES
*vs.* }
LOUIS BENECKE.

Be it remembered that on the trial of this indictment evidence was offered proving that defendant wrongfully withheld from Polk Lord, a colored claimant, and Silke Eikboof, the persons named in the
44 sixth and tenth counts of the indictment, as their agent and attorney, the amounts stated in those counts, being for pay and bounty, and on the days stated therein, that no part of said amounts had been paid by Benecke to them, but that he ever since had retained and withheld the same from said claimants; that the fact that their claims out of which said amounts were so withheld had been allowed and paid by the United States, had never been made known to them or either of them by defendant, and that neither of them ever made specific demand on him for said amounts.

And on the conclusion of the evidence for the prosecution the defendant moved the court to instruct the jury to acquit the defendant on the ground that the offenses charged were barred by the statute of limitations; which motion the court refused.

And now the motion for a new trial and in arrest of judgment coming on to be heard and the judges being divided in opinion on the following points, it is ordered upon the request of the parties that the same be certified to the Supreme Court for decision at its next session.

45 I. Is wrongfully withholding back pay or bounty by an agent or attorney from a claimant an offense under section thirteen of the act of July 4th, 1864, page 389 (13 Statutes at Large), or under section thirty-one of the act of March 3, 1873 (17 Statutes at Large, page 575), section 5485, Revised Statutes?

II. Are sections twelve and thirteen of the act of July 4, 1864 (page 389, 13 Statutes at Large), repealed by the act of July 8, 1870, page 195, 16 Statutes at Large?

III. Are the crimes set out in the indictment continuous down to the finding of the indictment?

IV. Does the statute of limitations constitute a bar to this prosecution?

V. Can the defendant be punished under section thirty-one of the act of March 3, 1873?

VI. Are the sixth and tenth counts sufficiently certain to authorize a judgment thereon?

46 Given under our hands and seals this 25th day of April, 1876.

[SEAL.] JOHN F. DILLON.

[SEAL.] A. KREKEL.

47 UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western district of Missouri, do hereby certify that the writing hereto annexed is a true transcript of the indictment, demurrer thereto, recognizance, demurrer to evidence, motions to set aside verdict and in arrest of judgment, and of the transcript of the proceedings in the district court of the United States in and for the western district of Missouri, and also the proceedings had in the said circuit court, in case No. 720, of the United States of America, plaintiff, against Louis Benecke, defendant (indictment for retaining pay and bounty from claimants as attorney and agent), as fully as the same remain on file and of record in said case in this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson, in said district, this 29th of June, A. D. 1876.

[SEAL.] H. C. GEISBERG, *Clerk.*

(Indorsement on cover:) No. 126. The United States, plaintiffs, vs. Louis Benecke. W. Missouri C. C. U. S. Certificate of division. Filed 8th July, 1876.

# In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
*vs.*
LOUIS BENECKE. } No. 126.

ON DIVISION IN UNITED STATES CIRCUIT COURT FOR WESTERN DISTRICT OF MISSOURI.

## BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
*vs.*
LOUIS BENECKE. } No. 126.

ON DIVISION IN UNITED STATES CIRCUIT COURT FOR WESTERN DISTRICT OF MISSOURI.

## BRIEF FOR UNITED STATES.

### STATEMENT.

The questions certified to this court are these, found at the top of record, page 19:

1. "Is wrongfully withholding back-pay or bounty by an agent or attorney from a claimant an offense under section 13 of the act of July 4, 1864 (13 Stats., 389), or under act of March 3, 1873, § 31 (17 Stats., 575), and R. S., § 5485?"

2. "Are sections 12 and 13 of the act of July 4, 1864, repealed by the act of July 8, 1870 (16 Stats., 195)?"

3. "Are the crimes set out in the indictment continuous down to the finding of the indictment?"

4. "Does the statute of limitations constitute a bar to this prosecution?"

5. "Can the defendant be punished under the act of March 3, 1873, § 31?"

6. "Are the sixth and tenth counts sufficiently certain to authorize a judgment thereon?"

The statutes are printed on the first six pages of the respondent's brief.

The indictment contained ten counts, for wrongfully withholding pay and bounty collected from the United States by Benecke for the parties mentioned. (Record, 9 to 11.)

The prisoner was found guilty upon the sixth and tenth counts, and acquitted upon all of the others. (Record, 7, bottom.)

The sixth count charged, in substance, that Lewis Benecke, on March 16, 1868, "and continuously from said last-mentioned day to the present time * * * did wrongfully withhold from one Polk Lord, then and there a claimant of the United States for arrears of pay and bounty, $210, which was then and there, and still is, due from and allowed by the United States," the said Benecke being then and there the agent and attorney of said Polk Lord for the collection of that claim, and having received the money as such agent. (Record, 10.)

The tenth count, in similar language, charges that, upon and from the next day (*i. e.*, March 17, 1868), and continuously thereafter to the present time, Benecke wrongfully withheld another sum of bounty money ($469) from one Silke Eikhoof, whose agent and attorney for the collection of the same he was, &c. (Record, 11.)

## BRIEF.

### I.

1. "Is wrongfully withholding back-pay or bounty by an agent or attorney from a claimant an offense under the act of July 4, 1864, § 13 (13 Stats., 389)?"

I will let the statute answer that question in its own language, which is, "That any agent or attorney * * * who shall contract or agree to prosecute any claim for a pension, *bounty*, or *other allowance*, under this act, on the condition that he shall receive a per centum upon any portion of the amount, OR *who shall wrongfully withhold from a pensioner* OR OTHER CLAIMANT *the whole or any part of the pension or* CLAIM *allowed and due to such pensioner or claimant*, shall be deemed guilty of a high misdemeanor," &c.

The entire section will be found in respondent's brief, pages 3, bottom, and 4, top.

The preceding section (12) establishes "the fees of agents and attorneys for making out, and causing to be duly executed, the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office, under this act," &c. (13 Stats., 389, § 12).

2. "Is such withholding an offense under the act of March 3, 1873, § 31 (17 Stats., 575)?"

That statute, recited upon page 4 of respondent's brief, provides that "any *agent* or *attorney*, or any other person instrumental in prosecuting a claim for pension or bounty land, * * * who shall wrongfully withhold from a pensioner or *claimant* the whole or any part of the pension or *claim* allowed and due such pensioner or *claimant*,

OR the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor," &c.

This phraseology, which seems sufficiently explicit and comprehensive to cover the offense of which Mr. Benecke was convicted, is preserved in R. S., sec. 5485.

II.

Does the act of July 8, 1870, § § 7 and 8 (16 Stats., 195), repeal the above-mentioned act of July 4, 1864, § § 12 and 13 (13 Stats., 389)?

It will be remembered that of these last-named sections the first (12) fixed the fees to be paid for collecting a claim for pension, bounty, &c.; and the other (13) punishes those who extort higher fees, or wrongfully withhold the money or land-warrant. In the act of July 8, 1870, the pensions are made payable directly to the pensioner (§ 3, p. 194); and by section 7, a different tariff of fees is established; then section 8 declares the penalty against those who demand and receive higher fees, but there is no reference to any wrongful withholding. This section (§ 8) is in respondent's brief, p. 4. It does not refer to the prior statute, nor does it relate at all to the subject of bounty; therefore, the implication of a repeal as to this is repelled.

III.

Is the crime of withholding a pensioner's, &c., money continuous?

One who holds my money to-day, received by him a year ago, and refuses to pay it to me, withholds it from me to-day as much as he did on the day it first came into his hands, if I then asked for and could not obtain it. The very suggestion of holding, or withholding, in law

or common parlance, embraces the idea of retention, of a *continued* denial of that which is demanded as a lawful right. If I have never been informed of its reception by him until to-day, and therefore could not demand it till now, certainly it is wrongfully withheld from me to-day. If any state of facts will support the verdict, they will be presumed to exist, after verdict.

IV.

If the crime is continuous, the bar of the statutes never can apply; so the answer to the fourth inquiry is determined by that given to the third, if this be answered in the affirmative. If the first knowledge of the receipt of the money, and its demand and refusal, were within the statutory time, the prosecution ought not to be considered barred.

V.

The liability to punishment under the statute of March 3, 1873, also depends upon the continuity of the offense. The language of the act, as before observed, is broad enough to cover this case. It punishes an attorney or agent who wrongfully withholds from a claimant the whole or any part of the claim allowed and due such claimant.

VI.

Is the sixth count sufficient to sustain the verdict?

If the crime is continuous, it certainly is sufficient, as it follows the language of the statute, and clearly indicates the person from whom the money was wrongfully withheld, the sum, and the right of Polk Lord to receive it from the United States through the agency of the respondent.

As the statement of time is not material, it will be assumed after verdict that the date proved was within the statutory limit, as the contrary is nowhere shown.

VII.

Is the tenth count sufficient?

This is a trifle more specific than the sixth, in that it states the derivation of Silke Eikhoof's claim against the United States.

Otherwise the same observations apply to each.

EDWIN B. SMITH,
*Assistant Attorney-General.*

As the statement of time is not material, it will be assumed after verdict that the date proved was within the statutory limit, as the contrary is nowhere shown.

## VII.

Is the tenth count sufficient?

This is a trifle more specific than the sixth, in that it states the derivation of Silke Eikhoof's claim against the United States.

Otherwise the same observations apply to each.

EDWIN B. SMITH,
*Assistant Attorney-General.*

IN THE

# Supreme Court of the United States

No. 126.

**THE UNITED STATES, Plaintiff,**

vs.

**LOUIS BENECKE, Defendant.**

*CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF MISSOURI.*

# STATEMENT AND BRIEF

***FOR DEFENDANT.***

JEFFERSON CITY, MO.:
BURCH AND FERGUSON, STEAM BOOK AND JOB PRINTERS.
1878.

# In the Supreme Court of the United States,

**No. 126.**

THE UNITED STATES, *Plaintiff*,

vs.

LOUIS BENECKE, *Defendant*.

CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

## STATEMENT OF THE CASE, BRIEF AND ARGUMENT FOR DEFENDANT.

### STATEMENT OF THE CASE.

Defendant was indicted by the grand jury of the District Court of the United States, for the Western District of Missouri, on the 11th day of September, 1875, being the regular September term of said court for that year, for wrongfully withholding the back pay and bounty of the parties named therein, for whom, it is alleged, he was the agent and attorney, and, as such, collected the money from the United States. The indictment contains ten counts, the first nine of which charge the retention of money due the representatives of colored soldiers, and the tenth the retention of money due the representatives of a white soldier. One John Cox was jointly indicted with him, but was discharged at the conclusion of the evidence on the part of the government, because there was no evidence tending to show that he received the money as agent or attorney.

The case was tried in the District Court, at the March term, 1876, and the result was a verdict of guilty on the sixth and tenth counts, and a verdict of not guilty on the other eight counts.

Defendant, in due time, filed motions for a new trial, and in arrest of judgment, pending which the District Court made an order, under section 1038 of the Revised Statutes, remitting the indictment and all the papers in the case to the Circuit Court.

The case was heard in the Circuit Court, on the motions for a new trial, and in arrest of judgment, April 25, 1876, and the judges of that court being divided in opinion on several questions arising on said motions, it was ordered, upon the request of the parties, that said questions be certified to this court for decision. The following are the questions thus certified:

1. Is wrongfully withholding back pay and bounty, by an agent or attorney, from a claimant, an offense under section 13 of the act of July 4, 1864, page 389, (13 Statutes at Large,) or under section 31 of the act of March 3, 1873, (17 Statutes at Large, page 575,) section 5485, Revised Statutes?

2. Are sections 12 and 13 of the act of July 4, 1864, page 389, 13 Statutes at Large, repealed by the act of July 8, 1870, page 195, 16 Statutes at Large?

3. Are the crimes set out in the indictment continuous down to the time of finding the indictment?

4. Does the statute of limitations constitute a bar to this prosecution?

5. Can the defendant be punished under section 31 of the act of March 3, 1873?

6. Are the sixth and tenth counts sufficiently certain to authorize a judgment thereon?

On the first question certified the defendant maintains the negative, on the second the affirmative, on the third the negative, on the fourth the affirmative, and on the fifth and sixth the negative.

The counts of the indictment involved in the determination of these questions are as follows:

6. And the grand jurors aforesaid, on their oath aforesaid, do further present that Louis Benecke and John Cox, late of said district, on the sixteenth day of March, in the year of our Lord one thousand eight huudred and sixty-eight, and continuously from said last-mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Polk Lard, who was then and there a claimant of the United States for *arrears of pay and bounty*, the sum of two hundred and ten dollars, which was then and there and still is due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Polk Lord for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

10. And the grand jurors aforesaid, on their oath aforesaid, do further present that Louis Benecke and John Cox, late of said district, on the seventeenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and continuously from said last mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Silke Eikhoof, who was then and there a claimant of the United States *for pay and bounty* of her deceased brother, Karsten Thede, the sum of four hundred and sixty-nine dollars, which was then and there and is still due from and allowed by the United States, they, the said Louis Benecke and John Cox, being then and there the agents and attorneys of the said Silke Eikhoof for the collection of said claim, and having received said money as such agents and attorneys, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

The sections of the statutes referred to in the foregoing certificate of division are as follows:

SEC. 13. AND BE IT FURTHER ENACTED, That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his

services under this act than is prescribed in the preceeding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowence under this act, on the condition that he shall receive a per centum upon[, or] any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offence.—[13 Statute at Large, 389, act of July 4, 1864, entitled "An act supplementary to an act entitled 'An act to grant pensions,' approved July fourteenth, eighteen hundred and sixty-two."]

**With the addition of the comma and the word "or" as shown in brackets, the above section is a literal copy of section seven of the act of July 14th, 1862, entitled "An act to grant pensions." The provisions of the section are original in the act of 1862, and are the only ones to be found in the statutes defining the offence charged in the indictment, except those quoted below, which follow in chronological order.**

SEC. 8. AND BE IT FURTHER ENACTED, That any agent or attorney who shall directly or indirectly contract for, demand, receive, or retain any greater compensation for his services as such agent or attorney, in any claim for pension or bounty land, than is prescribed or allowed under the provisions of the preceeding section, shall be deemed guilty of a misdemeanor, and, upon, conviction thereof, shall, for every such offence, be fined not exceeding five hundred dollars or imprisoned at hard labor not exceeding five years, or both, in the discretion of the court.—[16 Statute at Large, 195, act of July 8, 1870, entitled "An act to define the duties of pension agents, to prescribe the manner of paying pensions, and for other purposes."]

SEC. 31. That no agent or attorney or other person instrumental in prosecuting any claim for pension or bounty land shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars; and any agent or attorney or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is hereinbefore provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall, for every such offence, be fined not exceeding five hundred dollars, or imprisoned at hard labor not exceeding two

years, or both, at the discretion of the court.—[17 Statute at Large, 575, act of March 3, 1873, entitled "An act to revise, consolidate and amend the laws relating to pensions."]

SEC. 5485. Any agent or attorney or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner, or claimant, or the land warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offence be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion ot the court.—[R. S. U. S., p. 1069.

**The sections of the statutes which immediately precede those quoted above in the various acts cited, and which are material to be considered *in pari materia* in determining the person designated as the offender in the sections relied on to sustain the conviction, are as follows:**

SEC. 6. AND BE IT FURTHER ENACTED, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office under this act, shall not exeeed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, (five) dollars. In cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons, for which such agents and attorneys shall not be entitled to any fees,) one dollar and fifty cents.—[12 Statute at Large, 568, act of July 14, 1862.

**This section stands in connection with section 7 of the same act, which is a literal copy of section 13 of the act of July 4, 1864, copied above, with the slight exception noted. The corresponding section in the act of July 4, 1864, is as follows:**

SEC. 12. AND BE IT FURTHER ENACTED, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the Pension Office, under this act, shall not exceed the following rates: For making out, and causing to be duly executed, a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, ten dollars, which sum shall be received by such agent or attorney in full for all services in obtaining such pension, and shall

not be demanded or received in whole or in part until such pension shall be obtained; and the sixth and seventh sections of an act entitled, "An act to grant pensions," approved July fourteenth, eighteen hundred and sixty-two, are hereby repealed.—[13 Stat. at Large, 387, act of July 4. 1864.

SEC. 7. AND BE IT FURTHER ENACTED, That the fee of agents and attorneys for the preparation and prosecution of a claim for pension or bounty land, under any or all of the various acts of Congress granting the same, shall not exceed in any case the sum of twenty-five dollars. It shall be the duty of the agent or attorney of record in the prosecution of the case to cause to be filed with the commissioner of pensions, for his approval. duplicate articles of agreement, without additional cost to the claimant, setting forth the fee agreed upon by the parties, and which agreement shall be executed in presence of and certified by some officer competent to administer oaths. In all cases where application is made for pension or bounty land, and no agreement is filed with and approved by the commissioner as herein provided, the fee shall be ten dollars and no more.—[16 Stat. at Large, 195, Act of July 8, 1870.

**Sections 6 and 7 of the act of the July 14, 1862, sections 12 and 13 of the act of July 4, 1864, and sections 7 and 8 of the act of July 8, 1870, were revised, amended and consolidated, and embodied in section 31 of the act of March 3, 1873, as it stands copied above. In the revision of 1873, the sections were again separated, and the first in the order of arrangement of the prior acts, was placed in the title concerning pensions as section 4785, which is, in substance, the language of the first clause of section 31 of the act of March 3, 1873, as follows:**

SEC. 4785. No agent or attorney, or other person, shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding twenty-five dollars.[—R. S. U. S., 937.

**The last clause of section 7 of the act of July 8, 1870, was revised and re-enacted as section 4786, as follows:**

SEC. 4786. It shall be the duty of the agent or attorney of record in the prosecution of the case to cause to be filed with the Commissioner of Pensions, for his approval, duplicate articles of agreement, without additional cost to the claimant, setting forth the fee agreed upon by the parties, which agreement shall be executed in the presence of and certified by some officer competent to administer oaths. In all cases when application is made for pension or bounty land, and no agreement is filed with or approved by the Commissioner as herein provided, the fee shall be ten dollars and no more.—[R. S. U. S., 937.

# BRIEF AND ARGUMENT.

In maintaining the negative of the first question certified, the defendant contends that the subject of arrears of pay and bounty, and the offense of withholding the same, are not included in the legislation upon which this prosecution is based, and that there is no such offense known to the statutes of the United States.

The act of July 4, 1864, was in force when the offenses in this case are alleged to have been committed. It will be perceived that the clause, "or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension allowed and due such pensioner or claimant," on which the indictment is based, is the same in the act of 1862, where it originated, and the act of 1864, is omitted entirely from the act of 1870, is restored, somewhat altered, to the act of 1873, with the sentence, "or the land warrant issued to any such claimant," added, and in this form is incorporated into the revised statutes. If these offenses stand upon the original acts of withholding, as charged, the prosecution would be barred under the act of 1864, and the exact language of that act need not be especially considered. The construction of the act of 1873 and the revised statutes is really involved, upon the theory that the offenses are continuous. As, however, the language of the act of 1864 was somewhat modified by subsequent acts, and as that act and the act of 1862 are nearly alike, and embody the offenses, whatever they may be, as created by the former act, the argument to show that withholding back pay and bounty is not one of those offenses, may as well be applied

to the act of 1864 as any other. If this offense is not embraced by that act it is idle to predicate it upon the subsequent acts.

Sections 12 and 13 of the act of 1864 should be read *in pari materia*, or a portion of the latter section will have no meaning. They should be so read throughout this legislation, and are so constructed in the act of 1873. Section 12 prescribes the rate of fees and designates the persons affected by them. Who are they? Agents and attorneys "making out and causing to be executed the papers necessary to establish *a claim for pension, bounty, and other allowance before the pension office, under this act.*" The word bounty is used, but it evidently means a *bounty* obtainable through the pension office, and not bounty in the sense of back pay and bounty. The same word occurs in section 9 of the act of 1862, which is yet in force, where it is made the duty of the commissioner, "on the application of claimants for pension, *bounty*, or other allowance required by law to be adjusted and paid by the pension office," to furnish certain forms and instructions. And further along in the section, when the case is prosecuted by an agent or attorney, "on the issue of a certificate of pension or the granting of a *bounty* or other allowance," it is made the duty of the commissioner to immediately notify the claimant. The word was changed to *bounty land* in the act of July 8, 1870, and has been so continued in subsequent laws. It must be accepted, then, as a settled fact, that the individuals intended by section 12 are agents and attorneys practicing before the pension office in cases properly cognizable there. While the language of section 4 above quoted is in mind, it may be proper to note that the phrase, "*other allowance* required by law to be adjusted and paid by the pension office," indicates clearly that Congress had in mind other claims and claimants than pension and bounty land claimants as coming within the jurisdiction of the pension office, and that the general language hereinafter noticed may well be referred to the same classes of claims and claimants, without going outside of the statute for a subject. Section 13 declares the offences, designates the offenders and denounces the penalties. Against whom is the penalty denounced? "Any agent

or attorney who shall * * demand or receive any greater compensation for his services *under this act* than is prescribed in the *preceding section of this act*, or who shall contract or agree to prosecute any claim for a pension, bounty, or *other allowance*, *under this act*," for a commission on the amount secured, "or who shall wrongfully withhold from a pensioner or *other claimant* the whole or any part of the pension *or claim* allowed and due such pensioner or *other claimant*." As to the offense of charging illegal fees, or agreeing to prosecute claims for a commission, it is not possible to doubt the offenders intended. Agents and attorneys before the auditors of the Treasury Department in back pay and bounty cases cannot, by any possible construction, be included; and but for the fact that the government gravely maintains the contrary in this case, there would seem to be as little room to doubt the applicability of the same proposition to the offense of withholding. It must be maintained, in order to bring the defendant within the latter clause of the section, that the general words in italics, connected only by comas with the entire subject mater of both sections, so enlarge the scope and meaning of the section as to embrace any agent or attorney, who shall successfully prosecute any claim against the government, before any department, and under any statute, if he wrongfully withholds any part thereof. Such a construction would be manifestly tortured and unnatural, and unsupported by any just or rational rule applicable to criminal statutes. The crime imputed is infamous, the penalties severe, extending to imprisonment in the penitentiary at hard labor, with its consequent disfranchisements, and no latitude of construction should be indulged to make out the offense which is not required by a close application of the rules of strict construction.

Giving to the word *bounty* its legitimate meaning, i. e., *bounty land*, the specific subjects indicated by these sections are *pensions* and *bounty-lands*, and the general words, "other claimant," "or claim," "other claimant," immediately following the words, "pensioner," "pension," "pensioner," in the order named, are the only indications in the section that any-

thing else is included. By a well settled rule of construction, these general words refer to claims or claimants of the same class indicated by the specific words which they follow, that is, pension or bounty-land claims or claimants; and the review of the legislation on this subject which follows will show their were many such congnizable before the pension office. Of course, it is understood that this rule of construction must succumb to the real intention of the legislature, if that can be otherwise made to appear, and cannot be applied so as to produce an absurdity as a result. The rule is aided, however, by another well defined rule, which is, that crimes cannot be made out by implication merely, but must be clearly defined in the statute upon which they are predicated, and "nothing is to be deduced from the words than what they expressly warrant." The rule relied on is thus stated in 9 Bac. Abr. 252: "The rules of the common law will not suffer the general words of a statute to be restrained, to the prejudice of a person upon whom a penalty is inflicted; but there are a multitude of cases to show, that the general words of a statute ought to be restrained in favor of such persons." In 1 Swift's Digest, 12, citing Plowd. 17, it is thus stated: "16 Penal statutes are always to be construed strictly for the benefit of the citizen. Nothing is to be deduced from the words than what they expressly warrant, and they are not to be extended by implication. When a statute made it a felony to steal sheep or *other cattle*, it was held that the statute extended only to stealing sheep, and the words *other cattle* were too uncertain to create a capital offense." In Pot. Dwar. Stat., 247–8, the rule is stated with perspicuty thus: "By another restrictive rule of construing penal statutes, i*general words* follow the enumeration of *particular cases*, suc*general words* are held to apply only to *cases of the same kind* as those which are *expressly mentioned*." The case of *U. S. vs. Sheldon*, 2 Wheat. 119, is directly in point here, and furnishes an apt illustration of the rule stated. Defendant was indicted for transporting overland certain fat oxen, cows, steers and heifers from the United States to Lower Canada. The penalty of the Statute (2 Stat., 778, Sec. 2,) was denounced

against any person who should, "transport overland, *or otherwise*, in any wagon, cart, sleigh, boat, *or otherwise*," naval stores, provisions, munitions of war &c. It was held, that live fat cattle were articles of provision and munitions of war within the statute; but that driving them overland was not transporting them *otherwise* within the meaning of the statute; the general words "or otherwise" referring to and being qualified by the specific words precedding them.

These sections were considered in the case of the *United States vs. Marks*, 2 Abb. C. C., 531, where it was held that the penalty imposed by them applies only to claims arising under *that act*, and to no other pension acts. This gives the sections a more restricted meaning than is contended for here, and yet one that is not unreasonable in view of the peculiar language used. The Marks case was decided in May, 1869; and it is fair to assume that the attention of the Pension office was called to it, which may account for the changes made by the act of 1870. This act omits the restrictive words of the acts of 1862 and 1864, and so enlarges the scope of sections 12 and 13 as to embrace all claims cognizable before the pension office. The offense of withholding is omitted from this act, but the explanation is found in section 3, which prohibits the payment of pensions to agents and attorneys altogether.

Whatever may be the opinion as to the effect of this act as a repeal of the penal sections of the acts of 1862 and 1864, it must furnish a very satisfactory explanation of the scope and meaning of this entire legislation, when considered in connection with U. S. vs. Marks, and show conclusively that the subject of arrears of pay and bounty, and criminal offenses connected therewith, was not intended to be included. The case itself is in point to show that the offenses charged in this indictment are not within section 13; and the act of 1870 following so closely may be taken as a legislative construction to the same effect. By enlarging the scope of the sections, so as to include all classes of pension and bounty land laws, it in effect says, that sections 12 and 13 of the act of 1864 have a too restricted meaning, and we hereby enlarge them. If these sections in

the act of 1864 only embraced claims prosecuted under *that act*, they, of course, did not include back pay and bounty claims, because they did not arise under *that act*, and this prosecution must fail, unless it can be maintained under the act of 1873. The act of 1870 substitutes the words, "under any or all of the various acts of Congress granting the same," for the words, "under this act," in the act of 1864; which shows that the scope of the act was only enlarged so as to include all pension and bounty-land acts.

Congress, for the fourth time, carefully considered this subject in section 31 of the act of March 3, 1873. All the general terms of former statutes are dropped, and, "*claim for pension or bounty land*," is four times repeated throughout the section, in such a connection as to exclude every other claim. The words, "or other allowance," are omitted; and the simple word "claimant" is used in connection with the offense of withholding, instead of the words "other claimant" of prior statutes. The section bears on its face evidence of having been carefully written. A study of the previous sections will show at once that the subject matter was perfectly understood, and that the section was written to express with exactness and perspicuity just what Congress intended. The subject matter of all the previous sections is embraced in one full period, in which the separate sections of prior acts are connected easily and naturally by a simple semi-colon, and the whole is so clearly expressed as to admit of no verbal criticism. The words pension and bounty land are made to embrace the two distinct clases of claims cognizable before the pension office—just what they might reasonably have been held to mean in prior sections—and there is not a single word to denote that the subject of pay and bounty was in the mind of the author. As to the offense of withholding, the form of expression is changed, the word *claim* is used in the place of *bounty-land*, and the word *claimant* after the word *pensioner*; but the reference to bounty land is so unmistakable as to admit of no doubt; and if a doubt could arise it is effectually settled by the added sentence—new in this section—"or the land warrant

issued to any *such claimant.*" What claimant? The only claimant previously mentioned is the one connected with pensioner as above stated; and such claimant is pointed out as one connected with a land warrant. It would baffle human ingenuity, to say nothing of legal acumen, unrestrained by any rules of construction, to point out the location of arrears of pay and bounty, or any criminal offense connected therewith, anywhere in this section. How, then, can a criminal prosecution be predicated upon it? And if not upon this section, how can it be maintained at all? If, as before stated, it stands upon the original acts charged, it is barred by limitation. If a continuous offense, the act of 1873 must operate upon it and keep it alive; otherwise, in the years to come there will be myriads of crimes continued under acts that have remained obsolete for years. Surely, no such construction as this can be placed on the act of 1864. But section 13 of the act of 1873 is in reality a legislative interpretation of previous sections on the same subject, and shows conclusively that this prosecution has been maintained throughout without the authority of law.

How this section was treated in the revised statutes will fully appear by reference to the sections copied in the statement of the case. That the section was divided up and placed in different titles does not alter its meaning, or add anything to the force of that portion placed under the title of crimes. The reference even there is to the "Title pertaining to pensions," which preserves the connection perfectly; and if this were not so, "no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." (R. S. U. S., Sec. 5600.)

If more be required to maintain the position assumed, a brief view of the legislation of Congress on the subject of pensions of every grade and bounty-lands, prior to the act of July, 1862, will serve to throw light on this subject, and settle any doubts that might otherwise exist. Prior to the act of March 3, 1849, creating the department of the interior, the subject of pensions and bounty-lands was committed to the war department.

REVOLUTIONARY PENSIONS.—By the act of Sept. 29, 1789, 1 Stat., 95, the payment of pensions was assumed by the general government for one year, which obligation was continued from year to year until 1792. (1 Stat. at Large, 129, 218, 275.) The act of March 23, 1792, permanently assumed the payment of revolutionary pensions, and adopted regulations for establishing claims. The evidence was taken before the District Courts, and reported to the secretary of war, who reported the names to Congress, and they were put upon the pension rolls by special acts. (Id. 244, sec's. 2–6.) By act of February 28, 1793, the evidence was required to be taken before the District Judges and reported as before. (Id. 324.) The matter was further regulated, from time to time, but continued under the same supervision. (Id. 401, 418, 495; 2 Stat. at Large, 242, 260, 345, 496.) The act of April 10, 1806, repealed all previous regulations for the payment of revolutionary pensions, and made new regulations, still continuing the supervision of the war department. (2 Stat. at Large, 376.) This statute was renewed as its limitations expired. 2 Stat. at Large, 718, 3 Id., 596, 650.) Revolutionary pensions as a separate subject continued to command the attention of Congress, and were extended to many persons not formerly included, the act of April 10, 1806, forming the basis of this legislation. (See 1 Brightly's Digest, U. S. Laws, pages 728 to 746; 2 Id., 482, where these provisions are consolidated.) By the act of March 3, 1819, the secretary of war was authorized to place these pensioners upon the pension list without reporting them to Congress. (3 Stat. at Large, 528.)

INVALID PENSION SINCE THE REVOLUTION.—The subject of Invalid Pensions subsequent to the revolution, both to the regular army and the various volunteer organizations employed, engaged the attention of Congress from an early day down to the act of July, 1862. The act of April 30, 1790, first provided pensions to enlisted men. (1 Stat. at Large, 121, sec. 11.) Various additional provisions were added, until, by the act of March 16, 1802, the army was reduced to a peace basis, and the pensions declared. (2 Stat. at Large, 135, sec. 14.) By

the act of April 25, 1808, all invalid pensioners, regulars and volunteers, were authorized to be put upon the pension lists, under the regulations prescribed by the act of April 10, 1806, governing revolutionary pensions. (2 Stat. at Large, 496, sec. 3.) Subsequent legislation gave pensions to the officers and soldiers of the war of 1812, the Mexican war, and to militia and volunteer companies employed in the service of the United States. (See 1 Brightly's Digest U. S. Laws, pages 746 to 750, where the various provisions are collated.) These provisions show that, in addition to revolutionary pensions, a large number of pension claims were adjusted in the War Department prior to the act of March 3, 1849, and thereafter in the Interior Department—strictly speaking—in the pension office.

MILITARY BOUNTY LANDS.—By the act of August 7, 1789, 1 Stat. at Large, 49, sec. 1, the department of war was created, and among other matters, duties enjoined by the president "relative to the granting of lands to persons entitled thereto, for military service rendered to the United States," were placed under the supervision of that department. The act of February 11, 1847, granting bounty land to the surviving soldiers of the war with Mexico, placed the duty of issuing the certificates or warrants on the war department. (9 Stat. at Large, 124, sec. 9.) The act of Sept. 28, 1850, donated additional bounty lands, and the department of the Interior having then been established the duties pertaining to the issuing of certificates or warrants therefor were imposed upon that department. For this law, and subsequent provisions regulating the subject, as well as the subject of Virginia land warrants, and the scrip issued thereon, see 1 Brightly's Digest U. S. Laws, pages 96 to 104, and 2 Id., pages 100 and 101. They show another large class of claims adjustable in the pension office.

NAVAL PENSIONS.—The subject of naval pensions also engrossed the attention of Congress at an early day. The act of July, 1797, first provided these pensions, (1 State. at Large, 523.) By the act of April 23, 1800, the subject was still further regulated, and the subject of prize money as well. A

certain portion of prize money was reserved to the United States. The money thus obtained was constituted a fund for the payment of naval pensions, and the public faith was pledged for any deficiency. The secretaries of war, navy and treasury were made commissioners of this fund. (2 Stat. at Large, 45, secs. 5–10.) By act of March 26, 1804, the adjustment of these claims was committed to this commission. (2 Stat. at Large, 293.) The act of June 26, 1812, provided pensions for those killed, wounded and disabled on board the private armed vessels of the United States, by setting apart two per cent. of the prize money arising from captures made by such vessels. (2 Stat. at Large, 759.) These subjects continued to be regulated by separate legislation, until the act of July, 1862, now under consideration. (1 Brightly's Digest U. S. Laws, pages 750 to 753.) By the act of July 10, 1832, these funds passed to the supervision and control of the navy department, where they remained until transferred to the interior department, in 1849. (4 Stat. at Large, 572.) The adjustment of claims for naval pensions was committed to the pension office, subject to the supervision of the secretary of the navy. (5 Stat. at Large, 597, sec. 2.)

Commissioner of Pensions.—This office was created by act of March 3, 1833, the duties being to "execute, under the direction of the secretary of war, such duties under the various pension laws, as may be prescribed by the President," until the "expiration of the next Congress." (4 Stat., 622.) It was renewed from time to time, until January 19, 1849, when it was continued indefinitely. (9 Stat., 341.) By act of January 20, 1843, the duties were to "execute, under the direction of the secretary of war and the secretary of the navy, such duties in relation to the various pension laws as may be prescribed by the president; and also such duties in relation to the laws granting military bounty lands, as may be assigned to him by the secretary of war, with the sanction of the president.' (5 Stat. 597.) By act of March 3, 1849, it was transferred to the department of the interior. (9 Stat., 395.) By this last act, the department of the interior was created, and

all the supervising powers of the secretary of war, and the secretary of the navy, over the subjects cognizable in the pension office, were transferred to this department. Thus the jurisdiction over the vast number and variety of claims covered by the legislation just reviewed, became vested in the pension office; to which has been added the duties enjoined by the acts of July, 1862, July, 1864, July, 1870, March, 1873, and the revised statutes on the same subjects.

When Congress came to the passage of the act of July 14, 1862, it acted in view of the legislation above noted.

The act was one to *grant pensions*, and all its provisions relate to pensions, both military and naval. The subject of arrears of pay and bounty proper was not under consideration, but was being provided for by other legislation. It had never been the subject of legislation in connection with pensions, or even bounty lands; but had been kept separated, and cognizable before other departments, by the well considered policy of nearly a century. The act of July, 1864, was but *supplemental to the act to grant pensions*, and embraced no other subject of legislation. The act of March 3, 1873, is entitled "an act to revise, consolidate, and amend the laws relating to pensions." The entire subject again passed under careful review, and it is evident that it was well in mind in all its branches. The whole subject matter was pensions. Arrears of pay and bounty are not even mentioned. In fact the pay and bounty of the army and navy were being provided for by other legislation, and in a different way. If Congress intended to punish withholding back pay and bounty, why was it not done in plain words in the legislation embracing these subjects, as it was done with regard to claims prosecuted before the pension office in the legislation under notice? It is not reasonable to say that the subject was omitted from the legislation where it properly and naturally belonged, and in which it should have been expressed in unmistakable terms, for the purpose of being hidden under general words in another series of legislation, where it did not properly and naturally belong. To extract a meaning from these general expressions that will uphold this pros-

ecution violates every safe rule of construction applicable to criminal statutes. Both subjects were well in mind, and the omission in one series of statutes to say of back pay and bounty, what is several times repeated in the other series of statutes with reference to pensions and bounty lands, leads to but one conclusion, which is, that Congress never intended by any language used in these pension acts to punish unlawfully withholding back pay and bounty.

But a careful consideration of the pension and bounty land acts, above mentioned, will lead to another satisfactory conclusion as to the meaning of the general words of the criminal sections. It will be observed that several distinct claims, and as many classes of claimants, are embraced in this legislation. Revolutionary Pensions, Invalid Pensions since the Revolution, Naval Pensions, Bounty Land Certificates and Warrants, Treasury Scrip issued to soldiers of the war with Mexico in lieu of bounty land warrants, (9 Stat., 125, sec. 9,) and Land Scrip issued upon Virginia Land Warrants, (10 Stat., 143, sec. 1,) are all specifically pointed out; and, in the multitude of claims cognizable before the pension office under this legislation, other claims and claimants are doubtless involved, although they are not specifically named. If it were necessary to find an application for the general terms "*other claimant*," or the term "*claim*" as distinguished from pensions or bounty land, as used in section 13 of the act of July 4, 1864, it may readily be found in some one or more of these enumerated claims. With a subject so prolific of claims and claimants under consideration, there is nothing strange or exceptional in the use of these general terms; and it was evidently deemed a necessary precaution to use them to cover any defect of expression that might otherwise exist. The word bounty, clearly used in the sense of bounty land, might not have embraced some of the classes of scrip authorized to be issued, and pension might not have aptly expressed some other allowances authorized by the various acts, and the general word claim was used to give the section its proper scope. Many cases could arise under these pension and bounty land laws

which these general terms would naturally embrace, and it is therefore unnecessary to torture language and violate well settled rules of construction, to extend them to cases which they cannot, by any possiblity, embrace.

In this connection, it may serve a useful purpose, to glance hastily over the legislation of Congress on the subject of arrears of pay and bounty. This legislation is collected in Rapp's Digest of Bounty Laws, under the direction of the second Auditor, with the approval of the second Comptroller, and may there be found in handy form. The pay of the army in the field was entrusted to the paymasters, under the supervision of the war department. The policy of the government has always been to pay its soldiers and sailors promptly; but the exigencies of the service, especially during the late rebellion, created a vast number of unpaid claims, largely arrears of pay and bounty, which were adjusted and paid in the Treasury Department. Accounts relative to the pay of the army, and bounties, were cognizable before the second Auditor as early as 1817, (3 Stat. 366, Sec. 4), subject to the examination of the second Comptroller. (Id., Sec. 9). This has been the law ever since. Under the legislation referred to above, a vast business has become the subject of adjustment in the second Auditor's office, and the attention of Congress has been directed to it as a separate subject of legislation, very much in the same manner as in the case of the pension and bounty-land legislation, and contemporaneously with that legislation. Here would seem to be the proper place for defining and punishing the offense of withholding arrears of pay and bounty by agents and attorneys. And yet nothing of the kind appears.

It cannot be said that the subject was not in the mind of Congress. By the act of March 2, 1863, (12 Stat., 696), the subject of frauds and forgeries affecting these very claims was legislated upon, and nothing is there said of the offense charged here. Sec. 2 of the Joint Resolution of July 26, 1866, (14 Stat. 367), punishes agents and attorneys for taking illegal fees in colored bounty cases. The second Comptroller, acting under the authority vested in him by law, prescribed a

scale of fees in back pay and bounty cases, (except colored,) and denounced the penalty of suspension against any agent or attorney charging illegal fees. (Rapp's Digest, page 97.) So the matter of taking illegal fees seems to have been fully considered and provided against outside of the pension acts.

This legislation shows, also, that Congress undertook to protect this class of claimants by preventive remedies. By the act of March 29, 1867, (15 Stat., 26), claims for pay and bounty of colored soldiers were made payable to the Freedmen's Bureau, who paid the attorney his fees, and the balance directly to the claimant. If this act was enforced, there could be no such thing as withholding the claim, and, hence, no necessity for a penalty against it. By resolution of April 10, 1869, (16 Stat., 54), bounties to other soldiers were made payable *in person* to the claimants, payments to agents and attorneys were forbidden, and the fees were reserved and made payable directly to the agent or attorney, as in the case of colored claimants.

From this review of the subject, it seems clear that there is nothing in the language of the legislation itself, the context and subject matter, or the course of contemporaneous legislation, from which the intention of the legislature to denounce withholding arrears of pay and bounty can be deduced. Judicial legislation, or a latitudinarian construction wholly inconsistent with the canons laid down for the protection of the citizen, can alone bring such an offense within the criminal sections of these pension laws. Even if it could be said that this offense is within the mischief or reason of these sections, which is only true by the intimate relation of the subjects to the army and navy, and not by any kinship in legislation, this court would not be authorized to extend the language beyond its legitimate meaning on that ground. "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character, with those which are enumerated." (*U.*

*S. vs. Whilberger*, 5 Wheat., 96.) There is really no ambiguity in these statutes, and therefore nothing to construe. The effort is to import an offense into them by construction, which has no legitimate place there, contrary to all safe rules; and it is against such effort that this somewhat extended argument has been directed. In conclusion, the case of *United States vs. Clayton*, 2 Dill., 219, is respectfully referred to as containing an able and clear statement of the rule that should prevail in answering the first question certified in the negative.

On the second question certified—are sections 12 and 13 of the act of July 4, 1864, repealed by the act of July 8, 1870? the defendant maintains the affirmative. It is not the purpose to enter upon an extended discussion of this question. That has already been done by an eminent and learned member of this court, with a research and ability that cannot be commanded here, and upon the argument and authority thus obtained the defendant is satisfied to rest his case. The case of *United States vs. Bennett*, 1 Blatchford, 245, is respectfully referred to as containing all that can be said on this subject. In addition to the authorities referred to by MR. JUSTICE HUNT, the case of *Ellis vs. Page*, 1 Pick 45, and *Murdock vs. Memphis*, 20 Wall., at pp. 616 and 617, are respectfully referred to. They show that the re-enactment of section 13 of the act of July 4, 1864, in section 8 of the act of July 8, 1870, with the clause punishing the wrongful withholding omitted, amounts to a repeal of the entire section thus re-enacted. It may be observed, as one of the absurd result of the contrary view, that if the act of 1870 did not repeal the act of 1864, to the extent claimed, it was made a more serious offense to withhold a part, by way of illegal fees, than to embezzle the entire claim. And while it may be true that the same results would follow the repeal, it could not be attributed to a positive legislative enactment.

If the act of 1870 did repeal so much of the act of 1864 as

inflicts a penality upon agents and attorneys for withholding the claims therein designated, whatever they may be, such repeal was of itself a legislative remission, and the defendant cannot be punished, because the acts complained of were committed prior to the repeal, to-wit, March, 1868. The act of February 25, 1871, 12 Stat. 432, sec. 4, enacting a contrary rule, *was passed after this repeal*, and does not apply.

*United States vs. Tyner*, 11 Wall., 95.

*Maryland vs. B & O. Railroad*, 3 How. (U. S.,) 534, and cases.

On the third question certified—are the crimes set out in the indictment continuous down to the finding of the indictment? the defendant maintains the negative. The orignal act of withholding is charged on the 17th day of March, 1868, in both counts. On that day the crime was complete, and an indictment could have been found, or a civil suit maintained. The statute of limitations would commence to run against the civil action at once, and why not against criminal prosecution? This would seem to be an infallible test as to the continuous nature of the offense.

United States vs. Bennett, 12 Blatchf., 345.

On the fourth question certified—does the statute of limitations constitute a bar to this prosecution? the defendant maintains the affirmative. The offenses in both counts are charged originally on March 17, 1868, the indictment was filed Sept. 11, 1875, more than two years after the offenses are alleged to have been committed. Unless the offenses are continuous, the prosecution is necessarily barred by the statute. If five years be the limitation, it is still barred.

1 Stat. at Large 119, sec. 32.

Revised Stat. U. S., p. 193, Sec. 1044.

On the fifth question certified—can the defendant be punished under section 31 of the act of March 3, 1873? the defendant maintains the negative. If the offenses are not continuous, the prosecution was barred by limitation when the act of 1873 was passed; and to give it any effect on the facts would make it *ex post facto* in its operation. If the act of 1870 repealed the act of 1864, it was a legislative remission, and the act of 1873 could not recreate the offense. But this question is not material here. If the defendant can be punished at all, it must be on the theory that the offenses are continuous, and there is little to choose between the penalties of the different acts.

This statement, brief and argument has been prepared for me at my solicitation, by one of my attorneys in the court below, and I respectfully ask leave to file the same in my own name, which I presume to be my constitutional right.

LOUIS BENECKE, *Pro Se.*